Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALAN D. BOLINGER, JR.,

Petitioner,

v.

THOMAS RIDGE, Individually and in his capacity as Governor of the Commonwealth of Pennsylvania; GARY CROWELL, Individually and in his official capacity as Secretary of the Department of General Services of the Commonwealth of Pennsylvania; JOHN R. McCARTY, Individually and in his official capacity as Deputy Secretary for the Administration of the Department of General Services of the Commonwealth of Pennsylvania; GREGORY C. SANTORO, Individually and in his official capacity as Chief Counsel for the Department of General Services of the Commonwealth of Pennsylvania; GREGORY A. GREEN, Individually and in his official capacity as Director of the Bureau of Personnel for the Department of General Services of the Commonwealth of Pennsylvania; THOMAS G. PAESE, Individually and in his official capacity as the Secretary of Administration of the Commonwealth of Pennsylvania; PAUL A. TUFANO, Individually and in his official capacity as General Counsel of the Commonwealth of Pennsylvania,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner, Alan D. Bolinger, Jr., a police officer employed by the Commonwealth of Pennsylvania, and subject to discipline only for just cause, was denied due process of law when Respondents, Gary Crowell and John R. McCarty, terminated his employment without first providing Bolinger with a statement of the charges against him, an explanation of the employer's evidence and an opportunity to respond to said charges.

LIST OF PARTIES

Petitioner is Alan D. Bolinger, Jr., a Capitol Police Officer employed by the Commonwealth of Pennsylvania, Department of General Services.

Respondents are Gary Crowell, Individually and as Secretary for the Department of General Services of the Commonwealth of Pennsylvania, and John R. McCarty, Individually and as Deputy Secretary for the Administration of the Department of General Services, Commonwealth of Pennsylvania. All other Respondents set forth in the caption have been excluded by initial order of the District Court.

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The Opinion of the United States Court of Appeals for the Third Circuit is unreported. *Bolinger v. Ridge, et al.*, No. 98-7194 (3d Cir. filed March 9, 1999) (App. A). The Opinions of the United States District Court for the Middle District of Pennsylvania are unreported. *Bolinger v. Ridge, et al.*, No. 1:CV-97-1342 (M.D. Pa. filed March 2, 1998) (App. C); *Bolinger v. Ridge, et al.*, No. 1:CV-97-1342 (M.D. Pa. filed November 14, 1997) (App. E).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, which provides as follows:

> **Section 1. Citizens of the United States**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATUTORY PROVISION INVOLVED

The statute authorizing a civil action for the deprivation of protected rights, which provides as follows:

> **§ 1983. Civil Action for Deprivation of Rights.**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Petitioner Bolinger was hired by the Commonwealth of Pennsylvania as a Capitol Police Officer on or about January 31, 1986. The hiring was pursuant to and subject to the provisions of the Pennsylvania Civil Service Act, Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.1-741.1005. On or about August 1, 1985, Bolinger became a member of the Fraternal Order of Police, Lodge No. 85, the exclusive collective bargaining representative

of Capitol Police Officers. At all relevant times hereto, Bolinger and Respondents were subject to the terms of a collective bargaining agreement, which prohibits discipline except for just cause and that contains a grievance and arbitration procedure for challenging discipline and other contractual violations.

The Department of General Services is the Commonwealth Agency through which all Capitol Police Officers are employed. Respondent Gary Crowell served as Secretary of the Department of General Services and Respondent John R. McCarty served as Deputy Secretary for the Administration of the Department of General Services at the time the cause of action arose.

On September 3, 1995, Bolinger was arrested and charged with disorderly conduct, resisting arrest, public drunkenness and criminal mischief. On September 6, 1995, Respondent McCarty, acting under the direction of Respondent Crowell, suspended Bolinger without pay, effective September 3, 1995, until disposition of the criminal charges. Respondents imposed the suspension without providing Bolinger with a notice of the charges against him or an opportunity to respond to those charges. On or about September 14, 1995, the Fraternal Order of Police, Lodge No. 85 (hereinafter "FOP") filed a contractual grievance protesting the suspension. By letter dated September 29, 1995, McCarty denied the grievance without a hearing.

On October 17, 1995, McCarty, acting under the direction of Crowell, notified Bolinger that his employment as a Capitol Police Officer was terminated effective October 16, 1995. McCarty imposed termination without providing Bolinger with notice of the charges against him or an

opportunity to respond to those charges. On or about October 27, 1995, the FOP responded by filing a grievance protesting Bolinger's termination. McCarty denied the termination grievance by letter dated November 7, 1995. There was no hearing provided to Bolinger prior to issuance of this denial.

The FOP processed Bolinger's suspension and termination grievances through all steps of the contractual grievance procedure. It demanded arbitration of those grievances on June 6, 1996, following the Commonwealth's final denial. On or about July 18, 1996, the charge of disorderly conduct was reduced and Bolinger plead guilty to one charge of summary harassment in the Lancaster County Court of Common Pleas. All other charges against Bolinger were nolle prossed. In a letter dated August 6, 1996, McCarty, again acting under direction of Crowell, confirmed Bolinger's termination from Capitol Police employment. On February 25, 1997, an arbitration hearing convened to consider Bolinger's grievances. Prior to the completion of the hearing, the parties to the case, the Commonwealth of Pennsylvania and the FOP, agreed to a settlement wherein Bolinger was reinstated as a Capitol Police Officer with back pay, benefits and seniority from July 18, 1996 (when the plea agreement was reached) through the date of reinstatement. Pursuant to the settlement, the FOP withdrew the grievances but without precedent or prejudice to Bolinger's rights.

As a result of his suspension and termination, Bolinger did not receive the pay and benefits of public employment from September 3, 1995, through March 2, 1997. Bolinger lost wages in the amount of $3,961.48 during the suspension. He also paid $3,901.67 for treatment of alcohol

dependency during this period, which the parties agree would have been covered by the Capitol Police employee benefits package. Bolinger lost an additional $26,681.80 in lost wages for the period of termination not covered by the grievance settlement agreement. This period was October 16, 1995 through July 18, 1996.

Bolinger filed the initial Complaint in the Dauphin County Court of Common Pleas, Pennsylvania, under 42 U.S.C. § 1983, alleging that Respondents' refusal to provide him with notice of the charges and an opportunity to respond prior to suspension and termination violated his Fourteenth Amendment due process rights. The case was subsequently removed to the United States District Court for the Middle District of Pennsylvania. In connection with Respondents' Motion, the District Court entered an Opinion and Order dated November 14, 1997, dismissing Bolinger's claims relating to his September 6, 1995 suspension from employment. It also dismissed all claims against then Defendants Ridge, Santoro, Green, Paese and Tufano for lack of personal involvement or knowledge of Bolinger's discipline. Bolinger's claims against Respondents McCarty and Crowell with regard to the termination of his employment survived the dismissal motion. The parties subsequently filed a joint Stipulation of Facts, which was followed closely by Cross-Motions for Summary Judgment.

The District Court granted Summary Judgment for Respondents and against Bolinger by Opinion and Order dated March 2, 1998. The Court found that the governmental interests propounded by Respondents in terminating Bolinger outweighed the probative value of providing Bolinger with a pre-termination hearing. It focused on the provision in the State Civil Service law prohibiting

suspensions of more than thirty (30) working days, thus leaving Respondents with the decision to either reinstate or terminate Bolinger. The Court found that the Respondents could not return an officer charged with a crime without reducing public confidence in police services, thus raising the government's interest in effecting Bolinger's immediate termination.

Bolinger filed a timely Notice of Appeal to the United States Court of Appeals for the Third Circuit challenging the order granting Summary Judgment to Respondents Crowell and McCarty. By Opinion and Order dated March 9, 1999, the Third Circuit Court affirmed the District Court. It found that the governmental interest in immediately terminating Bolinger outweighed Bolinger's interest in receiving a notice of the charges against him and an opportunity to respond to those charges.

The question raised in this Petition is whether, in accordance with the principles of due process, Respondents Crowell and McCarty were required to provide Bolinger with a notice of the charges against him and an opportunity to respond to those charges prior to permanently terminating his employment.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment provides that no person shall be deprived of property without due process of law. U.S. Const. amend. XIV, § 1. Although there is no enforcement provision set forth in the Amendment, Congress created a mechanism for enforcing these rights via Section 1983 of the Civil Rights Act. 42 U.S.C. § 1983. This Section provides in pertinent part that if a person acting

under the color of State law shall deprive another person of constitutional rights, that person shall be liable to the injured party.

It is well established that a person with a legitimate expectation of continued employment has a property interest in that employment. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Honorable Supreme Court held that when, under the terms of a State Civil Service Act, an employee is subject to dismissal only for misfeasance, he is vested with a property right in continued employment. *Id.* at 538-539. In the instant case, Bolinger's employment was governed by the terms of the collective bargaining agreement between his employer and his representative organization, and he was also covered by the terms of the Pennsylvania Civil Service Act. 71 P.S. §§ 741.1-741.1005. Both the collective bargaining agreement and the Civil Service statute, at Section 807, *Id.* § 741.807, provide that covered employees shall not be discharged except for just cause. This limitation on the government employer's authority to remove Capitol Police Officers creates a property right in Bolinger's continued employment. This Court detailed the level of process due to public employees facing termination when it decided *Loudermill*, *supra*. This Court held that it is an essential element of due process to provide an employee with a constitutionally protected property interest in his employment notice and an opportunity for " 'some kind of hearing' " prior to discharge. 470 U.S. at 542 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972)). It recognized that the competing interests of employee and employer alike must be weighed in order to determine the need for some form of pre-termination hearing. These include "the private interest in retaining employment,

the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens." *Loudermill*, 470 U.S. at 543 (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

The Third Circuit held that when the facts of this case are considered, the Respondents' interest in removing Bolinger outweighed Bolinger's interest in presenting his side of the case. It reasoned that the government had a very strong interest in removing Bolinger from active police duty while criminal charges were pending. It added that Bolinger's interest in a pre-termination procedure was weakened by several factors. First, a post-termination grievance procedure existed and Bolinger had access to it. Second, Bolinger's employment status was not technically affected due to the fact that he was already suspended without pay and benefits. Third, Respondents' verified the existence of the criminal charges, which lessened the risk of an erroneous deprivation of employment and the probative value of any further information from Bolinger. The Third Circuit further explained that because of the thirty (30) day limit on suspensions, Respondents faced a dilemma of whether to reinstate Bolinger with criminal charges or to terminate his employment. This dilemma, according to the Court, would not be resolved by the use of a pre-termination procedure. In essence, the Third Circuit reasoned that where a police officer faces criminal charges, the mere existence of those charges mandates discharge despite anything the officer might have to say on the matter.

In *Loudermill*, this Supreme Court recognized the obvious value of an employee presenting his side of a case given that "[d]ismissal, for cause will often involve factual disputes." 470 U.S. at 543. It then made the following point:

> Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes place.

Id. In *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975), this Supreme Court addressed the significance of pre-disciplinary investigations in holding that employees have a right to union representation during pre-disciplinary interviews. This Court emphasized that despite the existence of a post-disciplinary grievance process that provides an employee with representation, the statements of the employee before discipline is imposed is a critical point. The following excerpt from that Opinion is instructive:

> Respondent [employer] suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. *At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.*

Id. at 263-64 (emphasis added).

There is no dispute in the instant case that Respondents' investigation of the criminal charges against Bolinger consisted of nothing more than verifying their existence. Respondents never formally charged Bolinger with precise items of misconduct, nor did they take his side of the story. Bolinger ultimately plead guilty to one charge of summary harassment while all remaining charges were nolle prossed. The District Court held that the criminal charges, although misdemeanors, were sufficient to suggest a disregard of the laws thereby substantiating the decision to terminate. The critical point, however, is whether the charges were valid. Certainly, Bolinger's account concerning the facts giving rise to these criminal charges affects their validity. An employer should have sufficient faith in its employees to at least take their side of the story rather than presuming guilt; yet, this is what Respondents did to Bolinger. This point is the heart of due process in the employment setting.

The fact that Respondents faced a decision to either reinstate or terminate Bolinger following when the thirty (30) day suspension period expired is of no moment. In *Gilbert v. Homar*, 520 U.S. 924 (1997), this Supreme Court addressed the issue of whether a police officer charged with a felony is entitled to notice of the charges and an opportunity to respond prior to unpaid suspension by his employer. This Court emphasized the difference between the length and finality of the employee's deprivation in suspension and termination cases. It held that the suspended employee is not entitled to a pre-disciplinary hearing so long as a sufficiently prompt post-suspension hearing procedure exists. This Court observed that unlike a termination case, where " 'the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect,' " there is ample opportunity in a suspension case to invoke the employer's

discretion later. *Id.* at 934 (quoting *Loudermill*, 470 U.S. at 543). The Court added the following statement regarding suspensions:

> [A] short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. [The employee] "has an interest in seeing that a decision concerning his or her continued suspension is not made in excessive haste." If the State is forced to act too quickly, the decision maker "may give greater weight to the public interest and leave the suspension in place."

Homar, 520 U.S. at 935 (quoting *FDIC v. Mallen*, 486 U.S. 230, 243 (1988)).

This Court's candor in recognizing the harshness of a termination action is significant. Although the officer facing felony charges in *Homar* was denied pre-suspension procedures, this Court carefully distinguished suspensions from terminations. It noted that further investigation into the criminal charges pending suspension actually benefits the affected employee. The benefit is obviously assurance that the employer will not grasp the ultimate property deprivation, which is termination, without obtaining "more accurate information about the arrest and charges." *Id.* Here, Respondents could have obtained more information about Bolinger's criminal charges and arrest by providing him with alleged charges of employee misconduct and an opportunity to respond to those charges. Respondents did not afford Bolinger such opportunity but summarily terminated him. Respondents actions violate the reasoning of this Court in *Homar*, *supra*.

THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THE PRIOR THIRD CIRCUIT DECISION IN *GNIOTEK* AND THOSE OF OTHER CIRCUIT COURTS ON THE PRE-TERMINATION HEARING ISSUE.

In *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), a group of Philadelphia Police Officers facing criminal charges on counts of bribery alleged that the City violated their due process rights by terminating them without adequate pre-deprivation hearings. The Third Circuit held that when the officers were given notice of suspension with intent to dismiss, the suspensions were de facto dismissals entitling said officers to some form of pre-deprivation hearing. The Court ultimately held that when the employer delivered written notice to the officers of the charges against them and then asked if they wished to make a statement, the officers received the required process due under the standard enunciated in *Loudermill*.

Here, the Third Circuit concluded that a police officer charged with a crime was not entitled to notice and an opportunity to be heard prior to being discharged due to the fact that he works in a position of high public trust, and also because Respondents would be required to reinstate or terminate him based on the strict requirements of the Pennsylvania Civil Service Act. It is at once unclear how this thirty (30) day suspension and termination involving Bolinger is different from that in *Gniotek*, where the officers on suspension with intent to terminate were entitled to notice and an opportunity to respond. The Third Circuit's decision here directly conflicts with its prior holding in *Gniotek* and the aforementioned decisions of this Supreme Court. It also conflicts with the decisions of other Circuit Courts of

Appeals where public employees have been granted pre-termination hearing rights.

In *Chaney v. Suburban Bus Division of the Regional Transportation Authority*, 52 F.3d 623 (7th Cir. 1995), the Seventh Circuit addressed the issue of whether a bus driver terminated for his involvement in an accident (as well as for his prior work history) was entitled to a pre-termination hearing when a post-termination grievance-arbitration procedure was available. There, the bus driver was suspended without pay and then terminated. The employer provided some notice of the charges prior to suspension but not termination. The driver appealed the termination to arbitration and was awarded reinstatement with back-pay. He later filed a Section 1983 civil rights action contending that the employer's refusal to provide him with pre-termination notice of the charges and an opportunity to respond violated his Fourteenth Amendment right to procedural due process. The Seventh Circuit agreed with Chaney. It held that due process requires notice and an opportunity to respond even where post-termination arbitration procedures exist. The Court added that providing notice and opportunity to respond before termination does not significantly burden the employer. In fact, it held that such procedures "would help avoid erroneous dismissals, thereby saving an employee the difficulties of unemployment and both sides the burden of subsequent arbitration." *Id.* at 629.

In *Harrison v. Wille*, 132 F.3d 679 (11th Cir. 1998), the Eleventh Circuit examined the issue of whether a pre-termination hearing is necessary when post-termination hearing procedures exist and criminal charges are the cause of the dismissal. There, a deputy sheriff was suspended and

then terminated for alleged theft of items from an evidence locker. The Court held that the deputy received ample notice and an opportunity to respond to the charges despite his refusal to answer on Fifth Amendment grounds. In reaching this conclusion, the Eleventh Circuit provided instructive reasoning:

> There must be "some kind of hearing" before termination of an employee with a protected property interest in his employment. The termination of employment is a severe deprivation, although the interest of the Sheriff's office in terminating deputies for misconduct is great. The importance of Plaintiff's property interest makes it necessary to provide some sort of pre-termination hearing, which includes notice and an opportunity to be heard.

Id. at 604 (quoting *Loudermill*, 470 U.S. at 542-43).

In *Schaper v. City of Huntsville*, 813 F.2d 709, *rehearing denied*, 818 F.2d 865 (5th Cir. 1987), a police officer was indicted for falsifying car title documents and pleaded no contest to the charges. He was later dismissed by his employer for falsifying the documents and for other department policy violations. The Fifth Circuit held that Schaper was entitled to a limited pre-termination hearing and that he in fact received one when the employer provided him with a memorandum explaining the charges and stating that Schaper may respond. *Id.* at 714-15. The Fifth Circuit emphasized that while the government employer's interest in removing unsatisfactory employees is strong, that interest merely modifies the level of pre-termination hearing necessary to the point where a limited one is sufficient to

satisfy the employee's private interest in not being deprived of his livelihood without due process. *Id.* at 716; *see also Browning v. City of Odessa*, 990 F.2d 842 (5th Cir. 1993) (holding that a discharged firefighter is entitled to a limited pre-termination hearing when a full post-termination procedure exists); *McMurphy v. City of Flushing*, 802 F.2d 191 (6th Cir. 1986) (holding that *Loudermill* requires a pre-termination hearing before a police officer can be discharged). None of these decisions conclude that the pre-termination hearing process may be eliminated. This is what the Third Circuit concluded, however.

The Third Circuit, like the District Court before it, evaluated Bolinger's termination by applying the procedural due process factors this Court set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976). This Court identified the process of weighing procedural due process factors as follows:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. The private interest here is Bolinger's continuation of his employment without permanent

termination. The significance of the permanent termination as opposed to suspension without pay is both substantial and obvious. This Court recognized the difference in *Gilbert v. Homar*, 520 U.S. 924 (1997). Similarly, the Third Circuit extended pre-termination due process protection to police officers facing criminal charges in *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986). In both of those cases, the issuing courts emphasized the importance of a full investigation of the charges against the police officer prior to termination. The importance of the officer providing his account of the questioned incident is obvious. Here, the Respondents did nothing more than verify the existence of criminal charges. Their failure to discuss the incident with Bolinger demonstrates the incomplete nature of their investigation. It is entirely possible that Bolinger would have provided Respondents with information leading them to the same conclusion reached by the criminal court, and the prosecutor who withdrew all but one of the charges, which was that Bolinger was not guilty of the laundry list of misdemeanors he faced and therefore not in a position where termination was required.

The failure of the employer to make a full investigation of an alleged criminal incident by offering the subject employee the opportunity to offer a response raises the likelihood that a termination of employment will be based on erroneous information. Meanwhile, the terminated police officer, saturated with the stigma of being fired, and therefore initially adjudged by his employer as a criminal, must await a grievance hearing to explain his side of the questioned events. The complete loss of pay and benefits as well as the damage to reputation is a huge loss for the employee to suffer. It was a huge loss to Bolinger.

The Respondents' interest in preserving public trust in law enforcement is not interrupted or adversely affected by providing Bolinger with a notice of charges and the opportunity to make a response to those charges. Rather, there should be greater interest in assuring the taxpaying public that they do not make hasty decisions concerning government employees without all of the facts available. Moreover, there is little imposition to the Commonwealth in providing Bolinger with an opportunity to respond. Respondents could have provided Bolinger with this opportunity at any time during his thirty (30) day suspension; they simply chose not to do so. The *Matthews* factors actually weigh in Bolinger's favor.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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